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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals, as amended (R. 95–99; Pet. 18), has not yet been officially reported. The district court rendered no opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 25, 1946 (R. 100), and rehearing was denied on July 16, 1946 (R. 99). The petition for a writ of certiorari was filed on September 3, 1946. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77 v (a)).

QUESTIONS PRESENTED

1. Whether, in a contempt proceeding instituted by the Securities and Exchange Commission to obtain compliance with a subpoena enforcement order, it was reversible error for the district court, after adjudging the contempt, to fail to commit the contemnors until they complied with the order of enforcement, and, instead, to impose a nominal fine not requested by the Commission.[1]

2. Whether, in view of the failure of the contemnors to appeal from the judgment of the district court, they have standing to challenge the sufficiency of the evidence to support the finding of contempt.

3. Whether the controversy has become moot because of the possibility that the petitioners' delay in compliance may render the Commission's inquiry fruitless.

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[1] The order adjudging the contempt was directed at petitioner Young as secretary-treasurer of the Penfield Company (R. 19). Both Young and the Company were, without objection, designated as appellees in the court below (R. 87) and both have filed the petition for a writ of certiorari. It is for these reasons that we shall refer, throughout this brief, to the "contemnors" and the "petitioners."

STATUTE INVOLVED

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77 (a), *et seq.*) (the "Act") are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

The Commission, pursuant to Section 20 (a) of the Act, Appendix, *infra,* p. 15, issued an order on May 14, 1942, and supplemental orders on February 13, 1943, and April 8, 1943, directing an investigation to determine whether a number of specified companies and persons (petitioners being added in the April 1943 supplemental order) had violated Sections 17 (a) and 5 (a) of the Act (15 U. S. C. 77 q (a) and 77 e (a)). The inquiry related to the possible sale of stock and other securities of petitioner, The Penfield Company of California ("Penfield"), by means of untrue statements of material facts and without registration (R. 2–3, 7; see *Penfield Co. of California* v. *Securities and Exchange Commission,* 143 F. 2d 746, 747–8 (C. C. A. 9), certiorari denied, 323 U. S. 768). In the course of this investigation, and pursuant to Section 19 (b) of the Act, Appendix, *infra,* p. 15, the Commission directed a subpoena *duces tecum* to petitioner Young, as an officer of Penfield (R. 3–4). The supboena required the production of certain books and records of Penfield covering the four-year period from May 1, 1939, to the date of the subpoena, April 9, 1943. See *Penfield Co. of*

California v. *Securities and Exchange Commission*, 143 F. 2d 746, 748. Upon Young's refusal to appear and produce the specified books and records, the Commission, on April 13, 1943, filed an application in the district court for an order enforcing the subpoena (R. 2, 4; see R. 79).

On June 1, 1943, after hearing, the court granted the Commission's application, specifically ordering Young, as secretary-treasurer of Penfield, to produce the specified items on June 8, 1943, and at any adjournment dates; and further ordered, pursuant to a stipulation by the parties, that the books and records, in lieu of their physical production at the office of the Commission, should be made available in the office of Penfield to such officer and employees of the Commission as might be designated for such purpose (R. 4–5, 11–15; see R. 3, 7–8). Penfield appealed from this order and, on June 30, 1944, the Circuit Court of Appeals for the Ninth Circuit affirmed. 143 F. 2d 746. A petition for a writ of certiorari was denied by this Court on November 6, 1944. 323 U. S. 768. On November 13, 1944, the mandate of the circuit court of appeals was issued, affirming said order of June 1, 1943, and, on December 7, 1944, that mandate was filed and spread upon the minutes of the district court (R. 5).

Thereupon, a designated officer of the Commission, on January 16, 1945, addressed and mailed a communication to Young and his attorneys ad-

vising that this officer would call at the office of Penfield in Los Angeles on January 24, 1945, for the purpose of examining the books and records referred to in the district court's order of June 1, 1943 (R. 6, 9–10; see R. 80). On January 24, 1945, the said officer and another designated officer of the Commission presented themselves at the office of Penfield and demanded to see the specified books and records but such demand was refused (R. 6–7).

On January 24, 1945, the Commission instituted civil contempt proceedings against Young by filing, in the district court, a proposed rule to show cause why Young should not be adjudged in contempt, together with an affidavit in support of the rule (R. 2–15).[2] The district court declined to issue the rule immediately but, instead, directed Young to show cause on February 5, 1945, why a further order should not be made directing Young to show cause why an order should not be made

[2] Petitioners incorrectly state (Pet. 4) that this affidavit was dated January 23, 1945, the day before the events therein referred to took place. As the record shows, the affidavit was dated January 24, 1945, the date of institution of the proceedings (R. 7). The court's order issued on that date is, however, misdated January 23, 1945 (R. 93–94). That this order was issued on January 24, 1945, is made clear by the reference in the order to the supporting affidavit which was verified on January 24, 1945 (R. 7, 15). Further, the district court order of February 8, 1945, refers to the "order issued by this Court on January 24, 1945, directing A. W. Young * * * to show cause * * *" (R. 17; see also R. 80, 81).

holding him in contempt of court (R. 15–16; 31). After hearing both sides on February 8, 1945, the court expressed doubt as to whether the Commission should obtain the evidence sought until after the conclusion of a pending criminal trial involving Young, Penfield and others (R. 72–73).[1] The court issued an order to show cause returnable on February 26, 1945 (R. 17–18), and stated that it would on that date decide whether or not to proceed with the contempt proceedings or postpone the matter until after the criminal trial (R. 76).

On February 26, 1945, the district court, over objection of Commission counsel, postponed the hearing on the order to show cause to May 28, 1945, then to June 25, 1945, and then to July 2, 1945, when the matter finally came on to be heard (R. 80–81), and, on that date, the court adjudged Young to be in contempt, but refused to grant a remedial decree calculated to coerce production of Penfield's books and records (R. 86). Instead, the court ordered Young merely to "pay a fine of $50, and stand committed until paid", with execution stayed temporarily, presumably to give Young an opportunity to pay the $50 (R. 87).

[1] This trial was upon an indictment returned in the District Court for the Southern District of California on September 29, 1944 (No. 17230), charging violations of the Securities Act (Section 17 (a) (1), 15 U. S. C. 77q (a) (1)), the mail fraud statute, and the conspiracy statute (see R. 28, 32–33, 47).

Young did not appeal from the order holding him in contempt, and paid the $50 fine (R. 96). On appeal by the Commission from the order fining Young (R. 20),[4] the circuit court of appeals, one judge dissenting without opinion, reversed that order and remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98).

ARGUMENT

1. Petitioners contend (Pet. 12) that the contempt proceeding was criminal in nature. They therefore argue that the criminal penalty imposed upon Young was within the discretion of the district court and was consequently not appealable by the Commission (Pet. 9–10, 11, 14).[5] This

[4] Petitioners comment on the fact that the Commission "waited" until September 26, 1945, to file its notice of appeal (Pet. 5). While it does not appear in the record, it may not be amiss to point out that in the interim, on August 27, 1945, the Commission filed a motion in the circuit court of appeals for leave to file a petition for a writ of mandamus directed to the district court. The motion was denied without opinion on September 13, 1945. *Securities and Exchange Commission* v. *Hall.*

[5] Petitioners cite Section 22 (b) of the Securities Act, Appendix, *infra*, pp. 15–16, which provides that failure to obey a subpoena enforcement order "may be punished * * * as a contempt thereof," and Section 268 of the Judicial Code (28 U. S. C. 385), which empowers the courts "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." These provisions, however, have general applicability to both civil and criminal contempts and merely declare the power of the courts to punish for contempt.

contention has no merit. As the court below held, the proceeding was one for civil contempt (R. 96). It was captioned as a civil action (R. 2, 11, 25), was called on the civil calendar (R. 77), and counsel for the Commission stated that the proceeding was for civil contempt (R. 35–39, 43, 77).[6] It meets the tests laid down by this Court in determining that a contempt proceeding is civil in character. *McCrone* v. *United States*, 307 U. S. 61, 64; and see *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211, 214 (C. C. A. 2), certiorari denied, 299 U. S. 603. It was a continuation of the earlier civil action in the district court to enforce the Commission's subpoena (see R. 77–78), and was a step in the enforcement of the district court's order of June 1, 1943. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–445; and see *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 305 (C. C. A.); cf. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 470.[7] That being so, the district court

[6] Petitioners' counsel recognized the civil nature of the proceeding by citing the Rules of Civil Procedure to support one of his contentions at the February 8, 1945, hearing in the district court (R. 21).

[7] The cases relied upon by petitioners (Pet. 8) do not conflict with these principles. In *Stewart* v. *United States*, 236 Fed. 838 (C. C. A. 8), the contempt case was prosecuted by the United States Attorney and was treated by the court and parties as a criminal contempt proceeding to vindicate the authority of the court. *Ex parte Grossman*, 267 U. S. 87, merely holds that the pardoning power of the President

had no discretion but to impose a remedial, coercive sanction designed to compel compliance with the mandate of the circuit court of appeals. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 449; *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1). Since the order of June 1, 1943, required performance of an affirmative act, namely, the production of Penfield's books and records, the appropriate means for securing compliance, as held by the court below (R. 96), is imprisonment unless and until the order is complied with. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. at 422.

Petitioners suggest (Pet. 6–7), but do not argue, that the district judge could, in disposing of the contempt, take into consideration the "fact", judicially known to him, that "nearly all" the records designated in the order enforcing the subpoena had been produced before him in the criminal trial. But there is nothing in the record to support this claim. And in the proceedings before the district court, counsel for the petitioners made no claim that the records in question had been produced at the trial of the criminal case, and the district court did not base its decision on any such ground (R. 86–87). In any event, the Commission is entitled to see *all* of the records referred to in the subpoena enforcement order.

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under the Federal Constitution "for offenses against the United States" extends to criminal contempts of court. The other cases cited in this connection by petitoners are discussed *infra*, pp. 9–10.

Petitioners' contention that the jurisdiction of the court was exhausted upon payment of the fine by petitioner Young (Pet. 11), is based upon the decisions of this Court in *In re Bradley*, 318 U. S. 50, and *Ex parte Lange*, 18 Wall. 163. These cases hold that where a statute provides for a sentence of fine *or* imprisonment in a criminal proceeding, and the court erroneously imposes a sentence of fine *and* imprisonment, and the fine is paid, the sentence cannot be changed to one of imprisonment and the defendant must be discharged. These decisions rest upon the principle that a person, having satisfied "one valid alternative provision of the original sentence" (318 U. S. at 52), cannot be again punished for the same offense. This principle has no application in a civil contempt proceeding in which the sentence that has been imposed is clearly invalid.

2. Petitioners contend that Young never disobeyed the subpoena enforcement order of the district court since no order demanding the Penfield records on a "specific date" was "validly served upon him" (Pet. 13). But this objection constitutes an attack upon the district court's judgment of contempt from which petitioners did not appeal. This issue was fully litigated in the district court and was decided adversely to the petitioners. The correctness of this finding was not brought before the circuit court of appeals for review and petitioners are therefore fore-

closed from raising the question in this Court. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191. In any event, the record shows that petitioners were fully apprised, both directly and through counsel, that the court's order directing them to produce was again operative following their unsuccessful appeal therefrom, and that the Commission was seeking compliance. The letter of notification, which was mailed on January 16, 1945 (R. 6, 9–10; see R. 80), advised them of the filing in the district court of the mandate of the circuit court of appeals. Enclosed in the letter was a copy of the subpoena enforcement order (R. 6, 9, 10–15). The request in the letter conformed to the provisions of that order that the records "shall be made available to such officer and employees of Securities and Exchange Commission as may be designated, at the office of Respondent [Penfield] * * *" (R. 14). If a demand were necessary,* it seems clear that this letter and the enclosures met that requirement. The Federal Rules of Civil Procedure permit service of notices upon the attorney representing the party and such service may be made by mail. Rule 5 (b). See *National Labor Relations Board* v. *Hopwood Re-*

*It is at least arguable that no formal demand was necessary, and that petitioners were under a positive duty to comply with the mandate (see R. 80), which was issued more than two months before the request was made, and filed in the district court over a month before (R. 5).

tinning Co., 104 F. 2d 302 (C. C. A. 2); *Tilghman* v. *Tilghman*, 57 F. Supp. 417 (D. C. D. C.). The court having acquired jurisdiction over the person of petitioner Young, no further process was required. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 454. Petitioners, however, assert that Young and his present counsel were in fact out of town from a date prior to the mailing of the letter of January 16, 1945, until after the Commission's officer called at the office of Penfield to see the books. However, they apparently were in town when the mandate was issued and filed and could have made the necessary arrangements to comply (See Pet. 3–4; R. 80). Moreover, the letter did come to the attention of co-counsel for petitioners in the district court proceeding (R. 65). Young could have been reached in ample time. Consequently, the record justifies the finding of the district court that Young's absence from the city was an inadequate excuse (R. 84).

3. Petitioners have done no more than to raise the question whether the Commission's "demand [is] a moot question more than three years after the period covered by the order, and after the corporation has ceased actively to function" (Pet. 6). Petitioners' reference presumably is to the three-year period of limitation (Act of December 27, 1927, 45 Stat. 51, 18 U. S. C. 582) on criminal prosecutions under the Securities Act (Section 24,

15 U. S. C. 77x). It is evident that the demand for the production of the records did not give rise to a moot question. Penfield's records may furnish leads to the discovery of later violations, and other proceedings not subject to this limitation are still open: the facts disclosed by the books alone or in conjunction with other evidence might justify injunctive proceedings by the Commission (R. 67–68) or administrative proceedings before the Commission (R. 45).

There is nothing in the record to indicate that Penfield has "ceased actively to function" (Pet. 6). Even if that were the fact, we fail to see its relevance. Dormancy of the company cannot preclude action against petitioners or any other companies or persons who may be shown to have violated the Act (R. 48, 75). The Commission's orders for investigation herein specifically recite as being under investigation a number of persons other than petitioners (R. 7–8).

Moreover, it does not lie in the mouths of petitioners to object to enforcement of the district court's order on the ground of the possible fruitlessness of the inquiry when their own obstructive tactics have thus far prevented examination of the books. Certainly, petitioners' contumacy makes it all the more important that the Commission be given every opportunity to scrutinize the books and records for such evidence as they may afford in aid of its investigation. The

delay caused by Young's disobedience should not result in any restrictive "forecasts of the probable result of the investigation." *Blair* v. *United States*, 250 U. S. 273, 282.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1946.

APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which

said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

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